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## Washington Court of Appeals Narrows Six-Year Statute of Repose in Unpublished Opinion

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The time limit on a claim for a construction defect is governed by a statute of repose and a statute of limitation. A statute of limitation bars a plaintiff from bringing an already accrued claim after a specific period of time. A statute of repose terminates a right of action after a specified time, even if injury has not yet occurred. In construction defect claims, RCW 4.16.310 is a statute of repose that terminates an action for construction defects that does not accrue six years from the time of substantial completion of construction or termination of services, whichever is later. Under RCW 4.16.040, an action upon a contract in writing must be commenced within six years. Generally, a statute of limitation runs from the time a claim accrues; a claim accrues when a party has the right to apply to a court for relief, which usually occurs at the time the claim is discovered. The interpretation of the statutes of repose and limitations by our courts caused initial confusion as to whether contractors could be sued beyond six years of substantial completion (*i.e.* if a defect was discovered five years after substantial completion, does the six-year statute of limitations allow six-years to be added on - allowing a claimant to bring a claim 11-years after substantial completion?)

However, in July 2003, RCW 4.16.326(1)(g) went into effect, requiring that construction defect claims be filed within six years of substantial completion of construction or termination of services, whichever is later, *regardless of when the claim was discovered*. *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wash. 2d 475, 85, 209 P.3d 863, 869-70 (2009); RCW 4.16.326(1)(g). Further, the provision is not retroactive. *Id.* citing *1000 Virginia*, 158 Wash.2d at 587, 146 P.3d 423. Thus, as of July 2003, a claim must both accrue and be filed within six years of substantial completion or termination of services, whichever is later. Even if the owner only discovers the defect seven years after substantial completion, the owner is precluded from bringing his or her claim. Of course, this left contractors struggling with new questions: What does "substantial completion or termination of services" mean under the statute of repose and how is that determined?

In a recent unpublished opinion, [Ledcor Industries, Inc. and Admiral Way, LLC v. SQL, Inc., et al.](#),

the Division I Court of Appeals provides contractors with some clarifying answers. The project involved a mixed-use building with a Bartell's Drugs on the bottom floor and residential units above. At issue was whether a general contractor's claims for indemnity against subcontractors fell within the six year statute of repose. The subcontractors presented the issue on summary judgment, which was granted, dismissing the general contractors claims against the subcontractors. The general contractor and owner appealed. The issue was ultimately decided by the Court's determination of when the six-year statute of repose began to run. The general contractor and owner argued that substantial completion was not achieved and, thus, the statute of repose did not begin to run because (1) the architect had not decided the project was substantially complete; (2) items were unfinished or defective and there was an outstanding punch list; and (3) the entire project was not completed as the drugstore had not received a certificate of occupancy. The general contractor and owner, in the alternative, argued that a subcontractor did not terminate its services until after substantial completion thereby extending the statute of repose.

The subcontractors argued, and the Court of Appeals agreed, that substantial completion was achieved because the certificate of occupancy was issued for the residential units, certain residential units at the project were sold, and any remaining defects or unfinished work did not prevent the units from being used for their intended purpose. The Court of Appeals ultimately held that

The condominium units were actually being used and occupied for their intended use at that time;

The architect declared the building was not substantially complete due to unfinished punch list items, but he did not declare these items prevented the building from being used for its intended purpose; and

The entire project (*i.e.* commercial portion - the drugstore) need not be complete if the claims are only related to the portion that is completed.

Significantly, the Court, in response to the general contractor's alternative argument, held that "there must be a *nexus* between the services performed after the date of substantial completion and the cause of action in order for the termination of services prong to extend the statute of repose" (Emphasis added).

The Court noted that there was no nexus between the original work provided by the subcontractor, which gave rise to the cause of action, and the services that the subcontractor performed after the date substantial completion. Stated another way, had the work performed by the subcontractor *after substantial completion* been the cause of the defects alleged of in the complaint, the statute of repose date may have been extended to the date that the subcontractor performed the additional work.

Although some answers have been provided by the Court of Appeals, the case consequently creates new questions: Are the factors presented in this case the minimum combination in which substantial completion can be decided by the court or will the combination of factors be decided on a case by case basis? Is there a separate limitation on the nexus between the termination of services and the original work or can the statute of repose be extended indefinitely as long as there is some proof that a "nexus" exists? Notwithstanding, it appears by this decision that the Courts are making further efforts to help narrow the six-year timeframe in which claims against construction contractors can be made in this state.

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